

- (2) What, if any, portion of the Award should be assessed against the Kansas Workers Compensation Fund.

The claimant appeals from the findings by the Administrative Law Judge that claimant has a 5 percent functional impairment. The Workers Compensation Fund appeals the decision to assess 50 percent of the Award against the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments made in the briefs and at oral argument, the Appeals Board finds:

- (1) The Appeals Board agrees with and affirms the Award of 5 percent permanent partial disability.

Claimant, an electrical assembly worker for Beech Aircraft Corporation, was injured on April 16, 1993 when she fell on the sidewalk outside of the Beech plant. She was taken to the hospital and x-rays were taken of her back, knees and neck. The results were normal. On April 26, 1993, claimant fell down a set of stairs at Beech. X-rays taken appeared normal.

Again, after a period of conservative treatment by Dr. John Toohey and then Dr. Michael Estivo, claimant was released to return to work on October 5, 1993. Claimant worked one day and thereafter called in sick or reported late each day until she was terminated on October 19, 1993.

Respondent asserts that claimant suffered no permanent impairment as a result of her injuries. Claimant, on the other hand, argues that the injuries rendered claimant unable to continue her employment and she is, therefore, entitled to work disability.

The Administrative Law Judge limited the award to functional impairment, finding that claimant could have continued in her same position for respondent but chose not to do so. The Administrative Law Judge based her findings, in large part, on the opinion of Dr. Estivo. He rated claimant's impairment at 5 percent based upon the subjective complaints of pain. The Appeals Board agrees.

Evidence tending to indicate the claimant's injury was not so severe as to prevent her from continuing in her employment is found primarily in the testimony of Dr. Estivo. After reviewing the videotape of the job duties, he testified, in his opinion, claimant would be able to perform those responsibilities. The record also contains substantial evidence tending to indicate claimant was exaggerating her symptoms. This evidence includes the testimony of the physical therapist, Pam Palmer, who testified that claimant exhibited inappropriate behavior, such as jumping at her touch and later exhibiting no problems with the same area in the back. She also testified she observed claimant limping while in physical therapy and later walking with a normal gait while leaving the facilities. The evidence suggesting the exaggeration of complaints also includes the testimony of Ann Densmore and Patricia Garwood, both of whom observed claimant walking and standing in a manner inconsistent with claimant's other testimony and claims. From the evidence presented, the Appeals Board concludes claimant could have continued in her regular employment for respondent. Respondent is, therefore, entitled to the presumption that

claimant has no work disability. K.S.A. 44-510e; Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

As above indicated, Dr. Estivo rated claimant's disability at 5 percent permanent partial general impairment. Dr. Jane K. Drazek rated claimant's impairment at 8 percent but, after seeing the videotape of claimant, concluded that she was not as "hypermobility" as was originally thought. The Appeals Board, therefore, agrees with the conclusion by the Administrative Law Judge's finding claimant sustained a 5 percent permanent partial general disability.

(2) The Appeals Board agrees with and affirms the finding by the Administrative Law Judge that the Workers Compensation Fund should be liable for 50 percent of the Award.

If the Fund is found to be liable, neither the respondent nor the Fund disagrees with the determination that the liability should be for 50 percent. This apportionment is based upon the only testimony on the issue in the record, that of Dr. Estivo. The Fund disagrees, however, with the determination that claimant knowingly misrepresented that she had not had previous accidents and had not been previously disabled or compensated for damages because of a prior accident. The Fund's counsel cites the Kansas Court of Appeals decision in Collins v. Cherry Manor Convalescent Center, 7 Kan. App. 2d 270, 640 P.2d 875 (1982), and argues that knowing misrepresentation cannot be established by circumstantial evidence.

The Appeals Board agrees that the evidence supports the conclusion that claimant probably, or most likely, did knowingly misrepresent her prior back injury and prior workers compensation claim at the time she applied for employment with the respondent. The employment application asked if claimant ever had a back, neck or shoulder injury or treatment for back, neck or shoulder problems. Claimant answered no. The form also asked if claimant had ever received workers compensation benefits for any illness or injury or had ever applied for workers compensation benefits. She answered no to each question. The evidence establishes that she did, in fact, have a prior workers compensation claim in the course of her employment at Ethicon, Inc., in Texas. She received an Award in excess of \$30,000.00 which, after fees and expenses netted her approximately \$18,000.00. The Texas compensation claim was for injury to her back. The Fund argues that the Collins decision requires that the respondent establish by direct evidence that claimant's misrepresentations were knowing misrepresentations and argues that evidence short of an admission by the claimant does not satisfy this statutory requirement. The Appeals Board disagrees. The Collins decision expressly holds the state of mind may be proven by circumstantial evidence. The Fund argues that claimant's education background and language problems explain claimant's misrepresentations. The Appeals Board disagrees and concludes that the respondent has proven claimant knowingly misrepresented that she had not been previously disabled or compensated in damages because of a prior accident or injury. The finding by the Administrative Law Judge is, therefore, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated March 24, 1995 should be, and the same is hereby, affirmed.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jacovita Gomez, and against the respondent, Beech Aircraft Corporation, a self-insured, and the Kansas Workers Compensation Fund, for an accidental injury which occurred April 16, 1993 and based upon an average weekly wage of \$614.53, for 23.52 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$7,032.48, followed by 391.48 weeks at the rate of \$20.49 per week or \$8,021.43 for a 5% permanent partial general body impairment of function, making a total award of \$15,053.91.

As of March 8, 1996, there is due and owing claimant 23.52 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$7,032.48, followed by 127.48 weeks of permanent partial disability compensation at the rate of \$20.49 per week in the sum of \$2,612.07, for a total of \$9,644.55 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$5,409.36 is to be paid for 264 weeks at the rate of \$20.49 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund is responsible for 50% of the benefits and costs awarded.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with her counsel is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and the Kansas Workers Compensation Fund to be paid direct as follows:

Barber & Associates	
Transcript of Preliminary Hearing	\$382.00
Transcript of Regular Hearing	\$509.20
Deposition of Pam Palmer	Unknown
Deposition of Sharon Herridge	\$145.60
Deposition of Sharon Spencer	\$454.80
Deposition of Michael Estivo, D.O.	\$192.20
Deposition of Raymund Alphonse Urbi Lagpacan	\$195.40
Deposition of Iris Brossard, M.D.	\$159.80
 Ireland Court Reporting	
Deposition of Jane Drazek, M.D.	\$189.00
Deposition of Jerry Dean Hardin	\$201.80

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Dennis L. Phelps, Wichita, KS
 Jeff C. Spahn, Jr., Wichita, KS
 Edward D. Heath, Jr., Wichita, KS
 Shannon S. Krysl, Administrative Law Judge
 Philip S. Harness, Director